Office-Supreme Court, U.S.
FILED
MAR 4 1981
ALEXANDER L. STEVAS,
CLERK

80-1524

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

PATRICIA ANN TIFFANY
PATRICIA ANN'S COUNTRY STORE,

Petitioner

vs.

COUNTY OF ALBEMARLE, VIRGINIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
ON APPEAL FROM THE
SUPREME COURT OF VIRGINIA

H. H. Tiffany
Post Office Drawer C
Waynesboro, Virginia 22980

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Did the Zoning Ordinance in question leave unbridled discretion to the local governing body in the issuance of special use permits?
2. Where unbridled discretion is permitted by a zoning ordinance, does the zoning ordinance violate the Fourteenth Amendment of the United States Constitution?
3. When the highest court of the State of Virginia holds that the granting of special use permits is a legislative function, and therefore does not require guidelines, does the State thereby permit special or individual legislation without uniformity in violation of the Fourteenth Amendment of the United States Constitution?
4. Where a zoning ordinance and comprehensive master plan are in conflict with each other so that the land owner

cannot determine with reasonable assurance what use he may make of his land, is the zoning ordinance then violative of the Fourteenth Amendment of the United States Constitution?

TABLE OF CONTENTS

Subject Index

	Pages
Opinion Below	2
Important Case of First Impression .	2
Jurisdiction	3
Constitutional and Statutory Provisions Involved	3
Facts	4
Statement of the Case	13
Conclusion	20
Notarized Statement of Mailing . . .	21

Appendix Index

Appendix A. Decision of the Supreme Court of Virginia

TABLE OF AUTHORITIES

Cases

Pages

Byrum v. Orange County, 217 Va. 37, 225 S.E. 2d 369, (1976) 14, 15, 18, 19

Gorieb v. Fox, 274 U.S. 603, 47 S.Ct. 675, affirming 145 Va. 554, 134 S.E. 914 16

City of Winchester v. Glover, 199 Va. 70, 97 S.E. 2d 661, (1957) 18

73 Am Jur 2d, Statutes, §43 . . . 17

Constitutional Provisions, Statutes, and Ordinances

Code of Ordinances of Albemarle County (Special Use Permits). . 13

United States Constitution, Fourteenth Amendment 2, 3, 20

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

PATRICIA ANN TIFFANY
PATRICIA ANN'S COUNTRY STORE,

Petitioner

vs.

COUNTY OF ALBEMARLE, VIRGINIA

Respondent

PETITION FOR A WRIT OF CERTIORARI
ON APPEAL FROM THE
SUPREME COURT OF VIRGINIA

Petitioner, Patricia Ann Tiffany, a resident of Virginia, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Virginia entered in this proceeding on December 4, 1980.

OPINION BELOW

The Court in this instance is requested to review the decision of the Supreme Court of Virginia dated December 4, 1980, attached hereto as Appendix A. The Plaintiff requests the consideration of this Court on the ground that the County of Albemarle in the State of Virginia is in violation of the Fourteenth Amendment of the U. S. Constitution by permitting individual legislation in zoning cases, with no uniformity in application.

IMPORTANT CASE OF FIRST IMPRESSION

Increasingly, local governing bodies are adopting the "use permit" process for practically all uses that a landowner would make of his land. This device gives the governing body more control over what the landowner does with her land. The highest court of Virginia has ruled that where the legislative body reserves this function unto itself guidelines, which would require uniformity, are not needed. This important

movement in the law of zoning and the law of private property has never been reviewed by this Court.

JURISDICTION

The federal constitutional questions raised in this appeal were raised in the trial court, in the original pleadings, and throughout the trial, and were again raised in the Petition for Appeal in the highest court in the State of Virginia. The Court in each instance failed to rule that the ordinance and its application to this case violated the petitioner's rights under the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions involved in this case are whether the petitioner's rights under the Fourteenth Amendment to the United States Constitution have been violated.

FACTS

Patricia Ann Tiffany, the landowner, received a special use permit in 1973 to operate a Country Store (General Store) on a tract of land consisting of 31.88 acres which formed the northwest quadrant of the Crozet Exit of Interstate 64 at U. S. 250. The use permit was granted for the construction of the store consisting of three floors of 4000 square feet to each floor and to be known as Patricia Ann's Country Store. Five acres of the 31.88 acres were then and remained zoned B-1 Business or Commercial. The store was not on that five acres. The minutes of the meeting of the Board of Supervisors on the present use permit request, revealed, through the remarks of Robert Tucker, the County Planner, that the five acres zoned commercial were ill designed for commercial use and such zoning was brought about by lack of planning in the haste of adopting an ordinance in 1968.

Testimony at trial revealed that despite numerous considerations of amendments to the ordinance, and the adoption of the master plan in 1971 and 1977, setting forth the guidelines for the basis of a new zoning ordinance, that no new zoning ordinance had then been able to obtain the consensus of the Board of Supervisors and the 1968 zoning ordinance remained in effect at that time.

The 1968 zoning ordinance sets forth certain agricultural uses which are permitted in an A-1 district as well as residential two-acre single-family housing and a few other uses, any of which may be utilized without the necessity of a special use permit. The ordinance sets forth numerous other permitted uses in an A-1 district which are permitted upon issuance of a special use permit. Two of those uses requiring such a special use permit are "General Stores (Country)" and "Gift Craft and Antique Shops". The testimony at trial showed that this

property is located on the Crozet Exit, which is approximately two miles along 250 from the new Western Albemarle High School, which high school is eastbound on 250 from the Interchange. The Interchange is five to six miles from the bottom of Afton Mountain when proceeding westbound along 250 from the Crozet Interchange. The undisputed evidence further showed that from the High School to the foot of the mountain were numerous commercial usages consisting of antique shops, a retail outlet of wood stoves, grocery stores, gift shops, fruit stands, an engineering office, the Highway Department Shop, the Moose Lodge, automobile garages, service stations, ending at the foot of the mountain with the Rockfish Gap Country Store, an operation similar to Patricia Ann's Country Store. The entrance to Patricia Ann's Country Store was the closest of such commercial uses to the Interchange and immediately adjoined the Interchange sharing the exit with the Plummer

property, which is zoned B-1 Business and which immediately adjoins the Tiffany land on the east.

The undisputed evidence adduced at trial revealed that the landowner had sold the 12,000 square foot building and two acres and the use permit had affixed to and followed the sale of the building and the landowner was applying for a use permit for a store identical in all respects to the former store except that the new store would occupy only 3,200 square feet of space. The former store was at the end of a 1400-foot access road and abutting against Interstate 64 on the rear while the new store was to be located on U. S. 250 set back two hundred feet from the highway and serviced by the same entrance road. Mr. Thomas Shumate of Higgs & Shumate, an Engineer & Surveyor, testified that on the 29.88 acres there existed three good sites for the construction of the commercial activity proposed and that

one of those three sites (the one closest to U. S. 250) had been chosen as the site for the now proposed smaller version of Patricia Ann's Country Store and that the site was relatively flat and serviced by the present access road which would be in all ways adequate, and in fact would meet the standards of the Virginia Department of Highways for width, visibility and grade for inclusion into the State Highway System. He testified that the construction could be completed without damage to the adjoining land. He also testified that Plummer property, consisting of five acres immediately adjoining the Tiffany property was zoned B-1 Business or Commercial and was far steeper than any portion of the Tiffany property and that five acres of the Tiffany property is zoned B-1 Business and is likewise far steeper than the area where the former Patricia Ann's Country Store is located or for that matter any other portion of the 31.88 acres with a present residue of 29.88 acres.

The Court permitted approximately 20 neighbors to testify that they were familiar with the operation of Patricia Ann's Country Store and familiar with the area and that the proposed use would not be detrimental to the health, safety and welfare of the community and would be in keeping with other uses already existing in the area. Approximately 20 additional persons, of similar qualifications, were recognized by the Court and accepted by the Court as tendering their testimony which would be cumulative in nature and generally in the same vein as those who had been permitted to testify.

The adjoining landowner on the west side, Mr. C. H. Gentry, testified that his property was zoned agricultural and he was aware of the proposed use, was in favor of such use, was aware of property values surrounding the Tiffany property and that the proposed use would not have a detrimental effect on the property values of anyone

elses' property. No objection was made to the proposed use of Patricia Ann's Country Store by any person, either at the Planning Commission meeting, the Board of Supervisors meeting or the trial below. One letter was received by the Planning Commission reciting that there was already sufficient commercially zoned land in the area and no more land should be re-zoned. No objection was made in that letter to the proposed use. All residents testifying stated that the area was predominently rural with commercialization along Route 250 and that the proposed use was in keeping with the kindred rural occupation in the area and would not change the character of the area. Many of the witnesses testified that the land had no other possible use whatsoever except for the proposed use. Testifying to all of the foregoing facts, among others, were Lloyd F. Wood, a member of the Board of Supervisors for 12 years, having left

the Board in 1975 and who was instrumental in the adoption of the present ordinance. Likewise, so testified Mr. Charles Dwyer, a real estate expert and up to recently, the Land Use Appraisal Administrator for the County of Albemarle, and Mr. William S. Roudabush, a surveyor who is presently a member of the Board of Supervisors. None of the witnesses for the defense stated that the proposed use would be injurious to the health, safety and welfare of the community. The defense, instead, relied upon the fact that approximately 114 acres of commercially zoned land existed in the area of the Crozet Interchange and that that was sufficient commercial land to be so zoned. Secondarily, the main thrust of the defense was that more than one special use permit should not be issued for any tract of land. No basis in law was recited for such principle and no consideration was given to the fact that the two acres with the former use permit was now severed, with

the permission and approval of the Board, from the original 31.88 acre tract and the residue of 29.88 acres had no outstanding use permit. Numerous photos and blue prints of the surrounding area were introduced by the plaintiff as exhibits. No evidence was ever adduced which would indicate any form of traffic hazard as a result. Mr. Keeler, Assistant County Planner, stated that the zoning ordinance was in deviation from the County Comprehensive Plan and that the existing zoning ordinance did not limit use permits to any specific number on any specific property. He further testified that although the comprehensive plan was adopted in 1977, and that an earlier comprehensive plan had been adopted in 1971, that no new zoning ordinance had been adopted to implement either comprehensive plan and that the 1968 zoning ordinance and 1968 zoning map which were in conflict with both the 1971 and 1977 comprehensive plans

were still in effect and permitted the proposed use upon the issuance of a special use permit.

STATEMENT OF THE CASE

The applicable section of the zoning ordinance of Albemarle County is as follows:

> "11-13 SPECIAL USE PERMITS
> 11-13-1. The governing body hereby reserves unto itself the right to issue all special exceptions and use permits permitted hereunder. Special use permits for uses as provided in this ordinance may be issued upon a finding by the governing body that such use will not be of substantial detriment to adjacent property, that the character of the district will not be changed thereby, and that such use will be in harmony with the purpose and intent of this ordinance, with the uses permitted by right in the district, and with the public health, safety and general welfare." (emphasis added)

The Virginia Supreme Court has held in Byrum v. Orange County, 217 Va. 37, 225 S.E. 2d, 369, (1976), that the governing body in granting or denying a use permit is acting in a legislative function and therefore has total discretion to grant a use permit or deny it. The zoning ordinance in the Byrum case was couched in the same language as the zoning ordinance in this case, that is to say that the word "may" was used in the ordinance. The Supreme Court of Virginia held that the term "may" allowed total legislative discretion to the board in granting or denying a use permit, with the sole restriction that the action of the board should not be "arbitrary, capricious or unreasonable". There are numerous acts which a local governing body could accomplish that would deny uniformity of application of the law to the various citizens of the county

without being "arbitrary, capricious or unreasonable". The Virginia Supreme Court further held in Byrum that had the local governing body delegated to an administrator the responsibility for issuing a use permit, the law would have required adequate guidelines and standards. It ruled, however, that where the governing body who is the legislative body reserves unto itself the right to grant or deny a use permit, it does not need guidelines because the board is the same body that would determine and promulgate the guidelines and standards and would issue the use permits. This reasoning under which the recited passage of the Albemarle County zoning ordinance has been upheld is a violation of the Equal Protection Clause of the United States Constitution inasmuch as it does not guarantee uniformity in application to all of the citizens of Albemarle County. In the case of Patricia Ann Tiffany, for instance, the

guidelines set forth certain criteria, which have been set forth in this petition heretofore. Nothing in the guidelines referred to the number of use permits that could be issued on a property, and yet a member or the Board of Supervisors who testified at the trial said that his reasoning for the denial was that more than one use permit should not be permitted on a given property, supposedly regardless of acreage.

Under the United States Constitution the appellant is entitled to the equal protection of the law and shall not be deprived of her property without due process of law.

The reasoning which led the Virginia Supreme Court and the United States Supreme Court to hold a zoning ordinance constitutional in Gorieb v. Fox, 274 U.S. 603, 47 S.Ct. 675, affirming 145 Va. 554, 134 S.E. 914, supplies the ground rules for declaring the instant zoning ordinance unconstitu-

tional if the zoning ordinance is to be read in conjunction with the comprehensive plan and yet is "in distinct conflict with the comprehensive plan or master plan" as it affects appellant's property. The cornerstones of this and all constitutional tests of a zoning ordinance are predictability and uniformity. If they are lacking, then no property owner can reasonably be expected to know what use he may make of his property. Furthermore, the governing body would then be at liberty to provide individual legislation to "bestow the benefits on some and deny it to others".

> "Constitutional uniformity is secured where the law operates alike on all who come within the scope of its provisions, or upon every person, subject, or object within the relation or circumstances provided for, or upon all persons or things within a legitimate class to which, alone, the statute is addressed, or upon all the individuals of a class for which the legislature is authorized to make specific laws, or, in general, where the statute makes a reasonable classification."
> 73 Am Jur 2d, Statutes, §43

The comprehensive plan or master plan of Albemarle County under which the trial court rested its decision is so general as to not even define the appellant's land and, therefore, deprives the appellant of the reasonable equal protection of the law if the master plan is construed to zone appellant's land as the Court found in its letter opinion.

The Virginia Supreme Court in its holding in City of Winchester v. Glover, 199 Va. 70, 97 S.E. 2d 661, (1957) held that the legislative body was acting in an administrative capacity in granting a use permit and was bound by its guidelines. The Supreme Court of Virginia in the Byrum decision expressly overruled its earlier decision announced in Glover and said instead that the board "may" be bound by guidelines. This judicial construction of the function of guidelines in a zoning ordinance places Virginia out of step with

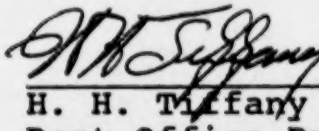
all of her sister states and allows a local governing body to seize absolute control of all of the land in its county by merely requiring that a use permit be obtained for practically all uses and then inserting the word "may" in the guidelines so as to conform with the Byrum case. This would allow the board to deny a permit to one person and grant it to another when they are both similarly situated, just so the action was not "arbitrary, capricious or unreasonable". The intention of zoning ordinances was not to remove the function of private property to the governing body, but instead to guarantee uniform use of land so as to protect all of the land. The Virginia decisions have now in effect unconstitutionally removed the decisions of private land to the local governing body and is a taking of the land, which taking is in violation of the United States Constitution and made applicable to the

several states by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the aforesaid reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Virginia.

Respectfully submitted,



H. H. Tiffany
Post Office Drawer C
Waynesboro, Virginia 22980

Counsel for Petitioner

NOTARIZED STATEMENT OF MAILING

I, H. H. Tiffany, an attorney who is a member of the Bar of the Supreme Court of the United States, hereby certify that on this 4th day of March, 1981, I personally mailed by first class mail by placing it in the United States Postal Service mailbox at Waynesboro, Virginia, postage pre-paid, and did so within the time permitted by Rule 28 of the Rules of the Supreme Court of the United States, the said 4th day of March, 1981 being the 90th day following the decision of the Supreme Court of Virginia, the Petition for Certiorari and Notice of Appeal.

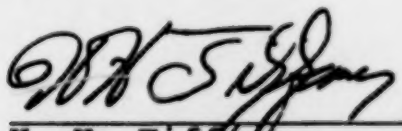
H. H. Tiffany

Subscribed and sworn to before me, a Notary Public for the State of Virginia at large on this 4th day of March, 1981.

Carmen C. Palumbo
Notary Public
My Commission Expires: 10-11-83
10.

CERTIFICATE

I hereby certify that I have forwarded by ordinary mail three (3) copies of this Petition to Frederick W. Payne, Deputy County Attorney, 416 Park Street, Charlottesville, Virginia 22901 on this 4th day of March, 1981 and have mailed a true copy hereof to the Supreme Court of Virginia, State Supreme Court Building, Richmond, Virginia 23219 on the 4th day of March, 1981.



H. H. Tiffany
Post Office Drawer C
Waynesboro, Virginia 22980

Counsel for Petitioner

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 4th *day of* December, 1980.

Patricia Ann Tiffany, d/b/a, etc., Appellant,

against Record No. 801090
Circuit Court No. 2871-C

County of Albemarle, Appellee.

From the Circuit Court of Albemarle County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: Deputy Clerk

APPENDIX A

No. 80-1524

APR 1 1981

ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

PATRICIA ANN TIFFANY
PATRICIA ANN'S COUNTRY STORE,

Petitioner

v.

COUNTY OF ALBEMARLE, VIRGINIA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Frederick W. Payne
Deputy County Attorney
for Albemarle County
416 Park Street
Charlottesville,
Virginia 22901
(804) 296-7138
Counsel for Respondent

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of Facts	1
Statement of Proceedings Below ...	4
Summary of Argument	6
Argument	
I. THE STANDARD FOR JUDICIAL REVIEW OF LEGISLATIVE ACTS IN ZONING IS WELL-ESTABLISHED AND CONSTITUTIONAL	7
II. THE STANDARDS FOR DECISION IN THE FORMER ALBEMARLE COUNTY ZONING ORDINANCE EXCEED THE MINIMUM REQUIRED BY LAW AND THE BOARD OF SUPERVISORS' DECISION WAS BASED THEREON AND SUPPORTED BY THE EVIDENCE	13
Conclusion	16

Appendix Index

Appendix A: Letter Opinion of Judge David F. Berry, December 21, 1979

Appendix B: Order, April 18, 1980

TABLE OF AUTHORITIES

	Page
Virginia Case Citations	
Board of Supervisors of Fairfax County v. Allman, 215 Va. 434 (1975)	15
Board of Supervisors of Fairfax County v. Jackson, ____ Va. ____ , 221 VRR 342 (1980) ...	15
Board of Supervisors of Loudoun County v. Lerner, 221 Va. 267 (1980)	15
Board of Zoning Appeals of Fairfax County v. Cedar Knoll, Inc., 217 Va. 740 (1977)	10 fn.1
Bollinger v. Board of Supervisors of Roanoke County, 217 Va. 185 (1976)	7,10
Byrum v. Board of Supervisors of Orange County, 217 Va. 37 (1976)	7,9,10,11
City of Richmond v. Randall, 215 Va. 506 (1975)	7,11,15
Civic Association v. Chesterfield County, 215 Va. 399 (1974)	7
Cole v. City Council of Waynesboro, 218 Va. 827 (1978)	10,13
Gorieb v. Fox, 145 Va. 554 (1926)	8,11

	Page
Martin v. City of Danville, 148 Va. 247 (1927)	8
Matthews v. Greene County and Boards, 218 Va. 270 (1977) ..	12
National Maritime Union v. City of Norfolk, 202 Va. 672 (1961)	8,9,11,15
Ours Properties, Inc. v. Ley, 198 Va. 848 (1957)	11
Federal Case Citations	
Agins v. City of Tiburon, 447 U.S. ____ (1980)	12
Gorieb v. Fox, 274 U.S. 603 (1927)	8,11
Penn Central Transportation Corp. v. New York City, 438 U.S. 104 (1978)	12
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	15
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) ...	12
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	12

Page

Statutes

Code of Virginia (1950-1973 Replacement Volume, 1980 Cumulative Supplement)

§ 15.1-489 14

§ 15.1-491 10,14

§ 15.1-495 14

Treatise

Rathkopf, Arden H., The Law of Planning and Zoning (4th ed.). 11,14

No. 80-1524

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

PATRICIA ANN TIFFANY
PATRICIA ANN'S COUNTRY STORE,

Petitioner

v.

COUNTY OF ALBEMARLE, VIRGINIA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

The respondent, the County of Albemarle, Virginia (hereinafter "the County"), does not seriously disagree with most of the recitations contained in the statement of facts in the petition for a writ of

certiorari filed on behalf of the petitioner. However, the County would respectfully note a number of additions, corrections, and/or clarifications.

First, it should be recognized that, at all times relevant to this application, the great majority of the land owned by the petitioner at this site (including the location of the existing store and the proposed store) was zoned agricultural. While several applications had been filed on behalf of the petitioner and/or her predecessors in title for various changes in the zoning status (including rezoning, special use permit, and the like), the property retained its original zoning. The existing store which is described in the petition exists by virtue of a special use permit granted the petitioner long before the commencement of this cause. This permit remains in effect, and the store remains in

operation under new management.

Secondly, the statement of facts recited in the petition leaves one with the impression that this property is located in or immediately adjacent to a built-up, urbanized area. In fact, although the uses recited do exist, they are of very low intensity and are spread out over a considerable stretch of highway; in fact, the area is, and at all times relevant to this cause has been, recognizably rural in character.

Thirdly, the petitioner recites that testimony by Mr. Keeler, the County's Assistant Director of Planning, tended to establish that the 1968 zoning ordinance in effect at the time of the trial of this cause was grossly in conflict with the County's adopted comprehensive plan. In fact, the testimony was that while the existing zoning <u>map</u> was significantly in

conflict with the plan, this was true, if at all, only to a much lesser degree as to the text of the ordinance. Mr. Keeler likewise testified that, at the time of the trial, the County was in the midst of preparing a new comprehensive zoning ordinance and map which would be much more nearly in compliance with the adopted comprehensive plan. Since the time of trial, such an ordinance and map have been adopted and are now in effect.

STATEMENT OF PROCEEDINGS BELOW

No statement of proceedings below appearing in the Petition for Writ of Certiorari, such a statement is included here for clarity.

This cause was commenced by Motion for Declaratory Judgment and Bill of Complaint for Injunction filed on behalf of petitioner on or about September 27, 1979,

in the Circuit Court of Albemarle County, Virginia, a court of record having general jurisdiction within the County. An answer was timely filed on behalf of the County. The object of the suit was to overturn the legislative act of the Board of Supervisors, the County's governing body, denying a special use permit for a retail store as requested by petitioner.

Trial was held on November 15 and 16, 1979, before the Honorable David F. Berry, Judge, sitting without a jury. At the close of the evidence and argument, the court took the matter under advisement. By letter opinion dated December 21, 1979, the court announced its decision, the final order being entered on April 18, 1980. See Appendix B.

The petitioner noted her appeal and petitioned the Supreme Court of Virginia for appeal on or about July 16, 1980. The

petition for appeal was denied on December 4, 1980.

SUMMARY OF ARGUMENT

The instant cause presents no substantial issue of federal law for the following reasons:

First, the standards for judicial review of the actions of local legislative bodies in the zoning context as prescribed by the Virginia Supreme Court are well-established and are consistent with the constitutional standards enunciated by this Court.

Second, the Albemarle County zoning ordinance contains sufficient standards for decision to satisfy the requirements of due process and equal protection of the law. The decision complained of was based on the standards for decision and was supported by the evidence.

ARGUMENT

I. THE STANDARD FOR JUDICIAL REVIEW OF LEGISLATIVE ACTS IN ZONING IS WELL-ESTABLISHED AND CONSTITUTIONAL.

The County agrees with the petitioner that Virginia law is clear as to the legislative character of a special use permit. Civic Association v. Chesterfield County, 215 Va. 399 (1974); City of Richmond v. Randall, 215 Va. 506 (1975); Byrum v. Board of Supervisors of Orange County, 217 Va. 37 (1976); Bollinger v. Board of Supervisors of Roanoke County, 217 Va. 185 (1976). However, it is simply an incorrect statement of Virginia law that the legislative body "has total discretion to grant a use permit or deny it." In fact, the standard for reviewing a special use permit denial/grant is essentially indistinguishable from that applicable to an application for amendment to the zoning map (i.e., a rezoning); the action of the

local legislative body (e.g., the Board of Supervisors) is presumed valid and will not be overturned by the court unless it is shown to be unreasonable, arbitrary or capricious; and if reasonableness be fairly debatable, it must be sustained. Gorieb v. Fox, 145 Va. 554 (1926), affirmed 274 U.S. 603 (1927); National Maritime Union v. City of Norfolk, 202 Va. 672 (1961); Martin v. City of Danville, 148 Va. 247 (1927).

Thus, the proper question is not whether there are standards for review of a special use permit, but what degree of specificity is required of such standards. As the Virginia Court pointed out in National Maritime, a legislative act is by its very nature, susceptible of only general standards. The Court went on to state that sufficient safeguards "against an arbitrary and uncontrolled exercise of dis-

cretion" were included when the ordinance specified (1) primary standards for carrying out a legislative policy; (2) a clear-cut principle to which a given application must conform; and (3) a clear and definite procedure for reviewing applications. National Maritime Union v. City of Norfolk, supra at 682.

The Virginia Court has subsequently made clear that no standards need be particularly specified in the ordinance in any case where the governing body of the locality (as in Albemarle County) is the body which reviews applications for special use permits and where the ordinance contains general provisions concerning its purposes and intent and outlines for its administration. Byrum v. Board of Supervisors of Orange County, 217 Va. 37 (1976); Bollinger

v. Board of Supervisors of Roanoke County, 217 Va. 185 (1976).[1] The Virginia Court has most recently clarified the state of the law in the case of Cole v. City Council of Waynesboro, 218 Va. 827 (1978), in saying:

> When the governing body of any locality reserves unto itself the right to issue special exceptions or use permits, as it is permitted by Code § 15.1-491, we have held that the granting of such exceptions and permits is a legislative function. Byrum, supra; Bollinger, supra; and Maritime, supra. . . . [I]n each case we specifically found that the enabling statutes, together with the zoning ordinances under which the counties and the city were acting, set forth the purposes and intent of the zoning ordinances and contained sufficient outlines and standards

---

[1] A distinction has been made where some administrative agent of the locality is delegated the authority of reviewing such applications. The Virginia Court has stated (in dictum) that more specific standards are required in such cases. Byrum v. Board of Supervisors of Orange County, supra; Cole v. City Council of Waynesboro, supra; see also Board of Zoning Appeals of Fairfax County v. Cedar Knoll, Inc., 217 Va. 740 (1977).

for enacting and administering them. 218 Va. at 837.

The standards for review of the County's action in this cause are, therefore, anything but novel. See 3 Rathkopf, The Law of Planning and Zoning (4th ed.), pp. 41-82 et seq. Indeed, the rule for court review of a legislative act in zoning was clearly enunciated by the Virginia Supreme Court and by this Court in the early case of Gorieb, and specifically made applicable to the modern special use permit context in Virginia by the holding in the National Maritime case (202 Va. at 681). Gorieb v. Fox; City of Richmond v. Randall; Byrum v. Board of Supervisors of Orange County, all supra; see also Ours Properties, Inc. v. Ley, 198 Va. 848 (1957). The County's research has failed to disclose any case in which the standard enunciated by this Court in Gorieb has ever

been substantially altered. See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Penn Central Transportation Corp. v. New York City, 438 U.S. 104 (1978); Agins v. City of Tiburon, 447 U.S. ____ (1980).

At this stage of the proceedings, the petitioner has raised for the first time the specter of a zoning ordinance where "practically all uses" are available only by special use permit. See Petition for Appeal at p. 19. The County submits that the Virginia Supreme Court has effectively outlawed this type of ordinance as a matter of Virginia law. Matthews v. Greene County and Boards, 218 Va. 270 (1977). This is therefore one straw man that this Court has no need to knock over.

II. THE STANDARDS FOR DECISION IN THE FORMER ALBEMARLE COUNTY ZONING ORDINANCE EXCEED THE MINIMUM REQUIRED BY LAW AND THE BOARD OF SUPERVISORS' DECISION WAS BASED THEREON AND SUPPORTED BY THE EVIDENCE.

The petitioner has argued that Virginia law contains inadequate safeguards gainst governmental abuse, and these arguments are discussed hereinabove. However, it is respectfully submitted that the County went far beyond the requirements of Gorieb and its progeny in enacting its zoning ordinance and had in fact included specific standards for special permit review. These standards included an exclusive list of uses permissible by special use permit (§ 2-1-25) (a list conspicuously absent in Cole) and criteria set forth in § 11-13 (cited at p. 13 of the Petition for Appeal). It was these criteria, together with the County's Comprehensive Plan, which were addressed by the

trial court in its decision of the case after hearing evidence for two days. See letter opinion of Judge David F. Berry, December 21, 1979, included as Appendix A.

There is no question raised that the standards set forth in the ordinance are improper or inadequate. Indeed, it is submitted that the ordinance as written is consistent with even the strictest standards for review and reflects both the intent of the enabling statutes and well-established general zoning principles. See Rathkopf, op. cit. § 41.09; see also Virginia Code (1950) § 15.1-495(b)(3); § 15.1-495(f); § 15.1-491(e); § 15.1-489 (1973 Replacement Volume, 1980 Cumulative Supplement).

In addition, the consideration of the Comprehensive Plan in zoning decisions is deeply engrained in Virginia jurisprudence. National Maritime Union v. City of

Norfolk; City of Richmond v. Randall, both supra; see also Board of Supervisors of Fairfax County v. Jackson, ____ Va. ____, 221 VRR 342 (1980); Board of Supervisors of Fairfax County v. Allman, 215 Va. 434 (1975); Board of Supervisors of Loudoun County v. Lerner, 221 Va. 267 (1980); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). The trial court's decision in this cause was expressly based upon competent, credible evidence and upon the above-cited standards for judicial review.

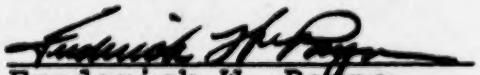
Accordingly, even were this Court to conclude that the general Virginia law regarding judicial review of special use permit decisions by local legislative bodies is somehow defective, it is respectfully submitted that the Albemarle County ordinance and the instant decision fully comply with even the most stringent conceptions

of fundamental fairness -- including those set forth in the Petition for Appeal.

CONCLUSION

For the foregoing reasons, the County respectfully prays that the writ of certiorari sought by petitioner be denied and that the County have judgment against the petitioner for its costs in this behalf expended.

Respectfully submitted,



Frederick W. Payne
Deputy County Attorney
for Albemarle County

Counsel for Respondent

STATEMENT OF MAILING

I, Frederick W. Payne, a member of the Bar of the Supreme Court of the United States, hereby certify that on this 31st day of March, 1981, I personally mailed the foregoing Brief in Opposition to Petition for Writ of Certiorari by first class mail by placing it at the United States Post Office at Charlottesville, Virginia, postage prepaid, addressed to the Clerk of the Supreme Court of the United States, within the time permitted by the rules of the Court therefor.

Frederick W. Payne

Subscribed and sworn to before me, a Notary Public for the State of Virginia at Large, this 31st day of March, 1981.

Notary Public

My commission expires:
July 2, 1983

CERTIFICATE

I hereby certify that I have forwarded by ordinary mail three (3) copies of this Brief in Opposition to Petition for Writ of Certiorari to H. H. Tiffany, Esquire, Post Office Drawer C, Waynesboro, Virginia 22980, on this 31st day of March, 1981, and have mailed a true copy hereof to the Supreme Court of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia, 23219, on this 31st day of March, 1981.

Frederick W. Payne

APPENDIX A

COMMONWEALTH OF VIRGINIA
SIXTEENTH JUDICIAL CIRCUIT

December 21, 1979

H. H. Tiffany, Esquire
Brandon Ladd Circle
Waynesboro, Virginia 22980

Frederick W. Payne, Esquire
Deputy County Attorney
416 Park Street
Charlottesville, Virginia 22901

In Re: Tiffany v. County of Albemarle
Case No. 2871-C

Gentlemen:

During the trial of this case all issues were effectively disposed of except the question of whether or not the County produced evidence of reasonableness in denying the Special Use Permit sufficient to make the question fairly debatable. You will recall that at the conclusion of the Plaintiff's evidence, and upon a motion to strike by the County, I ruled that the presumption

of legislative validity has been properly challenged by the Plaintiff by producing probative evidence of unreasonableness and the motion to strike was denied.

At the conclusion of all the evidence I reviewed the objective criteria set forth in the Albemarle County Zoning Ordinance, Section 11-13-1, and found that there was no evidence upon which it could be said that the issuance of the Special Use Permit in question would be of substantial detriment to adjacent property or that such use would not be in harmony with the uses permitted by right in the district or with the public health, safety and general welfare. I reserved judgment, however, on the question of whether or not the uses sought by the Plaintiff would be in harmony with the purpose and intent of the Zoning Ordinance and whether the character of the district would be changed thereby. It is upon these

two latter considerations that the case is now to be decided.

In making this determination, the 1977 Comprehensive Plan of Albemarle County must be considered. The evidence of the Plaintiff clearly established business and commercial activities already underway or already permitted by existing use or existing zoning in the immediate area. You will also recall that many of the questions regarding existing zoning and other permitted uses around the interchange came from the bench. Perhaps the concept of interchange property being properly suitable for commercial use is erroneous. This was apparently realized by the professional planners in evaluating and updating the County Comprehensive Plan, and, on the surface, there appears to be a distinct conflict between the Zoning Map on the one hand and the goals and objectives of the Comprehensive Plan on

the other. In my opinion, the action of the Board of Supervisors in denying the Plaintiff's application must be viewed more in the context of the Comprehensive Plan than in the context of the existing zoning and other uses in the area in question.

One of the Comprehensive Plan's stated goals and objectives with relation to commercial properties is the establishment of small scale commercial areas in a variety of locations so as to reduce automobile dependency, so long as the use of the County's highways is not impaired and safety hazards are not created. Taken at face value, this would appear to support the Plaintiff's application. Taking the Comprehensive Plan as a whole, however, it can be seen that commercial development in the western part of the County is to be discouraged south of Route 250 and en-

couraged in the Crozet area. Furthermore, the preservation of the rural atmosphere of the western portion of the County is strongly encouraged as a long range objective. Thus, while the granting of the Special Use Permit may be considered in keeping with past commercial uses, the expansion of commercial uses in those rural areas outside of the Crozet business area is strongly discouraged under the Comprehensive Plan.

It seems to me, therefore, that the action of the Board of Supervisors in denying the Special Use Permit, when viewed in the light of the Comprehensive Plan for Albemarle County, is at the very least, fairly debatable.

An Order should be prepared denying Plaintiff's motion to declare the Zoning Ordinance invalid and void, and denying

the prayer for relief by injunction against the enforcement thereof. No relief, in my opinion, can be awarded the Plaintiff in this action.

Very truly yours,

/s/ David F. Berry
David F. Berry

DFB/je

APPENDIX B

VIRGINIA: IN THE CIRCUIT COURT FOR
THE COUNTY OF ALBEMARLE

PATSY ANN TIFFANY
doing business as
PATRICIA ANN'S COUNTRY STORE

Case No.
2871C

V.

ORDER

COUNTY OF ALBEMARLE

This cause came on the 15th and 16th days of November, 1979, to be heard on the motion for declaratory judgment and bill for injunction filed on behalf of the plaintiff; on the answer of the defendant; upon exhibits filed and evidence heard ore tenus on behalf of the parties, respectively; and was argued by counsel;

And it appearing to the Court from the evidence aforesaid that the Albemarle County Zoning Ordinance is lawful and constitutional

as applied to the property here in question and that the denial by the Board of Supervisors of the special use permit complained of in this cause is fairly debatable;

It is accordingly ADJUDGED, ORDERED and DECREED that the relief prayed for in the said motion for declaratory judgment and bill for injunction be, and it hereby is, denied, for the reasons stated in the letter opinion of the Court.

And this cause is ended.

ENTER: /s/ DAVID F. BERRY
JUDGE

DATE: 4-18-80

I ASK FOR THIS:

GEORGE R. ST. JOHN
County Attorney

By /s/ Frederick W. Payne
Frederick W. Payne
Deputy County Attorney
416 Park Street
Charlottesville, Virginia 22901
Counsel for Defendant

SEEN AND OBJECTIONS NOTED:

/s/ H. H. Tiffany
Henry H. Tiffany